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Office of Administrative Law Judges
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Issue Date: 22 August 2003

Case No. 2001-BLA-128

In the Matter of:
BILLY RALPH FURGERSON,
Claimant,

v.
JERICOL MINING INCORPORATED,
Employer,
and
DISTRICT DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Joseph Wolfe, Esq.
On behalf of Claimant

Ronald Gilbertson, Esq.
On behalf of Employer

J. Phillip Giannikas, Esq.
On behalf of Director

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER ON REMAND - DENIAL OF BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[1]

[1]The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the

On December 13, 2002, this case was remanded to the Office of Administrative Law Judges by the Benefits Review Board for further consideration.[2] All parties were afforded the opportunity to submit briefs as provided in the Act and the above referenced regulations. Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

Billy Furgerson ("Claimant") filed his initial claim for benefits on August 30, 1994. (DX 24). The Office of Workers' Compensation Programs ("OWCP") denied his claim on January 31, 1995. Claimant did not appeal and his initial claim was administratively closed. He filed his second claim for benefits on February 26, 1996, and it was denied on July 15, 1996. (DX 25). On November 28, 1997, Claimant completed another application for benefits, which the OWCP construed as a request for modification of the prior denial. The Director, OWCP issued a proposed decision and order denying benefits on March 12, 1998.

Claimant filed his second duplicate claim for benefits under the Act on June 18, 1999. (DX 1). On July 6, 2000, the Director, OWCP issued a proposed decision and order denying benefits. Following a formal hearing in Harlan, Kentucky on March 21, 2001, the undersigned issued a decision and order awarding benefits on May 31, 2001. Employer appealed the award of benefits to the Benefits Review Board ("Board"). On September 24, 2002, the Board affirmed in part, vacated in part, and remanded Claimant's duplicate claim to the undersigned for further consideration. Specifically, the Board directed the undersigned to address the issue of whether Claimant's second duplicate claim was filed within the statutory period prescribed by § 718.308.[3] If the undersigned finds Claimant's second duplicate claim to have been timely filed and presently viable, the Board then directs the undersigned to reconsider the credibility of the medical opinion evidence to specifically determine whether the newly submitted medical evidence is sufficient to establish a material change in conditions in a manner consistent with the holdings in *Kirk*, 264

United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr" refers to the official transcript of this proceeding.

[3]On the issue of timeliness, the Board directed the undersigned to determine whether Dr. Kabani's 1994 report constitutes "a medical determination of total disability due to pneumoconiosis that has been communicated to the miner" in accordance with § 718.309 and the Sixth Circuit Court of Appeals holding in *Tennessee Consolidated Coal Company v. Kirk*, 264 F.3d 602 (6th Cir. 2001). Additionally, the Board directed the undersigned to address the Director's argument, to the contrary, that a duplicate claim is not time-barred by a medical opinion which meets the requirements of § 718.308 but, like Dr. Kabani's, is rejected as unpersuasive in a prior claim proceeding. Finally, if the undersigned finds that the evidence of record is sufficient to establish rebuttal of the presumption that Claimant's claim was timely filed, then the undersigned must give Claimant the opportunity to prove that extraordinary circumstances exist that may preclude the dismissal of the claim in accordance with § 718.308(c).

F.3d 602; *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994); *Stewart v. Wampler Brothers Coal Co.*, 22 B.L.R. 1-80 (2000)(*en banc*); and *Flynn v. Grundy Mining Co.*, 21 B.L.R. 1-40 (1997). If the newly submitted evidence does establish a material change in conditions under § 725.309(d), according to the Board, the undersigned must re-address the credibility of the medical opinion evidence of record under § 718.202(a)(4). If the existence of pneumoconiosis arising out of coal mine employment is found, the undersigned is directed by the Board to reconsider all relevant medical evidence under § 718.204(c) and the applicable case law. The Director filed a motion for reconsideration on October 24, 2002, which was denied by the Board on December 13, 2002. On April 3, 2003, the undersigned issued an order allowing the parties thirty days to submit briefs on remand. Claimant, Employer, and Director have all submitted briefs.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Timeliness

The Board directed that the undersigned initially determine whether Claimant's second duplicate claim is time-barred because it was filed more than three years after Dr. Kabani's 1994 report. Claims for benefits under the Act are accorded a statutory presumption of timeliness. § 718.308(c). A claim is timely filed if it was filed before three years after a "medical determination of total disability due to pneumoconiosis" is communicated to the miner. § 718.308(a); 30 U.S.C. § 932(f). Appellate jurisdiction lies with the Sixth Circuit Court of Appeals since Claimant last engaged in coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc). The Sixth Circuit has issued three relevant decisions on the application of § 718.308.

In *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), the Sixth Circuit held that the time period in which a miner must file for benefits, under § 718.308(a), starts after each denial of a previous claim, provided that the miner works in the coal mines for a substantial period of time after the denial and a new medical opinion of total disability due to pneumoconiosis is communicated. *Ross*, 42 F.3d at 996. Ross, the claimant, was initially denied benefits under the Act in 1981. He began working again as a coal miner before quitting in 1983. He filed a duplicate claim in 1985. Accordingly, the Sixth Circuit found that Ross' claim was timely filed. In *Ross*, the Sixth Circuit explicitly declined to hold that the statute of limitations only applied to the filing of initial claims. *Id.* The Sixth Circuit found it's holding to be dictated by the progressive nature of pneumoconiosis and logic, since it would make no sense to allow serial applications for benefits and then limit the ability to file serial applications to three years. *Id.*

Five years later, the Sixth Circuit again addressed the application of § 718.308 in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). Beginning in 1979, Kirk filed three claims for benefits, all of which were denied. *Kirk*, 264 F.3d at 604. He filed his fourth duplicate claim in 1992, and was awarded benefits. *Id.* The Sixth Circuit found that Kirk's 1992 claim was timely filed, stating:

> [t]he three-year statute of limitations clock begins to tick the first time that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination, like Kirk's 1979, 1985, and 1988 claims, and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period.

Id. at 608. The Sixth Circuit stated that Kirk's three prior denials do not trigger the statute of limitations because they were premature filings, noting that previous medical opinions did not conclusively opine that Kirk was totally disabled due to pneumoconiosis. Then the Court referenced its unpublished decision in *Clark v. Karst-Robbins Coal Co.*, No. 93-4173, 1994 WL 709288 (6th Cir. 1994), where it rejected a successful state workers' compensation claim that relied upon a finding that the claimant became permanently and totally disabled as the result of the occupational disease of pneumoconiosis as a "medical determination."

The Sixth Circuit addressed the timeliness issue most recently and definitively in reaching their unpublished decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 48 Fed.Appx. 140, 2002 WL 31205502 (6th Cir. October 2, 2002)(unpublished). Between 1987 and 1988, Dukes received several opinions from physicians that he was suffering from pneumoconiosis. He filed a claim for benefits under the Act in 1988, which was denied by a Department of Labor claims examiner. Dukes did not appeal and he never returned to coal mining. In 1995 he filed a duplicate claim for benefits, and he was awarded benefits. The Sixth Circuit engaged in a thorough and complete analysis of the three-year statute of limitations, wherein they characterized their holding in *Kirk* as a finding that no medical determination" exists absent a valid medical opinion, notwithstanding prior knowledge or existence of the disease. *Dukes*, 48 Fed.Appx. at 144. They then held, relying on *Kirk* and paying deference to the remedial intent of Congress in creating the Act, that the three-year statute of limitations applies to subsequent claims. *Id.* at 145. Next, the Sixth Circuit stated that the three-year statute of limitations is not triggered by undiagnosed cases of pneumoconiosis, self-diagnosed cases, and (relying on *Ross*) "all situations in which the miner has filed a claim but has not yet contracted the disease - including claims filed on the basis of a misdiagnosis." *Id.* In light of the denial of Dukes' 1988 claim, the Sixth Circuit found, for legal purposes, that Duke's condition was misdiagnosed. The Sixth Circuit then agreed with and adopted the reasoning behind the Tenth Circuit Court of Appeals' decision that a "final finding by an Office of Workers' Compensation Program adjudicator that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations." *Id.*, citing to *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 1507 (10th Cir. 1996). The Sixth Circuit stated that a misdiagnosis does not equate to a medical determination. *Dukes*, 48 Fed.Appx. at 146. In a restatement of it's holding, the Sixth Circuit stated, "if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitations purposes." *Id.* Effectively, a "proper

medical determination" is required to trigger the statute of limitations. *Id*. This holding complies with the recognition of pneumoconiosis as a progressive disease.

After the Sixth Circuit found that a misdiagnosis does not trigger the statute of limitations, it addressed the apparent conflict with its holding in *Kirk*.

> In *Kirk*, we stated in dicta that:
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> > Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.
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> However, we decided *Kirk* on the basis that the miner there did not have a medically supported claim. Today, we have carefully considered this issue and hold otherwise.

Id. at 147 (citations omitted)(footnote omitted)(emphasis omitted).

The Director correctly points out that unpublished decisions are not binding precedent in the Sixth Circuit. *See* 6th Cir. R. 28(g); Director's Brief on Remand, p. 5. In fact, 6th Cir. R. 28(g) states that the use of unpublished cases before the Court of Appeals or the district courts is disfavored. In compliance with 6th Cir. R. 28(g), the Director served a copy of the *Dukes* decision on all parties. However, the Director also points out that Rule 28(g) does not preclude the use of unpublished cases, nor does it preclude the consideration of the persuasive reasoning of unpublished cases. *Managed Health Care Assoc., Inc. v. Kethan*, 209 F.3d 923 (6th Cir. 2000); Director's Brief on Remand, p. 5. The Director relies on *Dukes* and *Brandolino* to support it's position that Claimant's second duplicate claim is timely filed because Dr. Kabani's 1994 report constitutes a misdiagnosis. Director's Brief on Remand, p. 5.[4] Claimant, substantially relying on the Sixth Circuit's discussion of the three-year statute of limitations in *Dukes*, asserts essentially the same argument as the Director. Claimant's Brief on Remand, p. 3-8. Claimant urges the

[4]The Director argues that there is no evidence in the record to show that Dr. Kabani's report was ever communicated to Claimant as required by § 718.308(a). The Director also argues that Dr. Kabani's 1994 report was never determined to be reasoned and documented. In the alternative, the Director states that Claimant should be given an opportunity to establish the applicability of the extraordinary circumstances exception at § 718.308(c) if the undersigned determines that Claimant's second duplicate claim was not timely filed.

undersigned to not follow the Sixth Circuits' statements as to the running of time limits in *Kirk* because the Court's language is the clearest instance of "obiter dicta" based on the Court's decision in *Dukes*. Claimant's Brief on Remand, p. 4, 8.[5]

In contrast to the positions of the Director and Claimant, Employer argues that the Benefits Review Board decision remanding this claim to the undersigned adopted the Sixth Circuit's decision in *Kirk* as controlling precedent. Employer's Brief on Remand, p. 6. Employer argues that Claimant's second duplicate claim is time-barred under § 718.308(a), as explained by *Kirk*, because Dr. Kabani's 1994 report rebuts the presumption of timeliness. Employer's Brief on Reman, p. 8. Employer argues this position, despite recognizing that Dr. Kabani's report was discounted in favor of contrary evidence, because *Kirk* holds that the three-year limitations clock is not stopped just because the medical opinion was found not to be supported by the weight of the medical evidence. *Id.*

Employer's brief does not address the implications of the Sixth Circuit's subsequent opinion in *Dukes*. I acknowledge that *Dukes* is not binding precedent, yet I find that the reasoning employed by the Sixth Circuit in *Dukes* to be significantly persuasive regarding the definition of a medically supported claim. The *Dukes* decision was issued after *Kirk* and utilized a much more thorough analysis of § 718.308. The Sixth Circuit's decision in *Dukes* does not reject *Kirk*. Rather, in keeping with the essential holding of *Kirk*, it clarifies the definition of a medically supported claim by finding that a misdiagnosis is not a medically supported claim. It is worthy to note that, regardless of how the Sixth Circuit constructed their application of § 718.308 between *Ross, Kirk,* and *Dukes*, the Court found all three claims to have been timely filed. In so doing, the Sixth Circuit had one eye on the remedial nature of the Act, with the other focusing on the progressive nature of pneumoconiosis.

Further support for relying on *Dukes* is garnered from the Board's invitation to the undersigned to consider the argument raised by the Director in reliance upon *Brandolino*, which the Sixth Circuit agreed with and relied upon in reaching their decision in *Dukes*. The Board's decision remanding this claim was issued prior to *Dukes*, but before it's decision denying Director's request for reconsideration. I am not dissuaded from relying on the persuasive reasoning of *Dukes* because the Board declined to reconsider it's decision upon being presented with the *Dukes* decision. It is plausible that the Board, since it invited the undersigned to consider the Director's *Brandolino* argument, decided reconsideration was not necessary because their decision left sufficient room for the undersigned to analyze the impact of *Dukes*.

In arguing that Claimant's second duplicate claim was not timely filed, Employer is placed in the awkward position of arguing that Dr. Kabani's 1994 report was a valid medical opinion,

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[5]Claimant also argues that due process prevents a finding that his second duplicate claim was untimely filed. He also argues that Dr. Kabani's 1994 report did not communicate a diagnosis of total disability due to pneumoconiosis because Dr. Kabani never stated that Claimant was totally disabled, only that he had a moderate respiratory impairment that precluded him from working in the coal mines based on his abnormal spirometry and resting arterial blood gases. In the alternative, Claimant argues that extraordinary circumstances exist, to such a degree that would entitle him to the exception of § 718.308(c), because he relied on settled law as put forth by the Benefits Review Board that was extraordinarily changed by the Sixth Circuit.

while later on arguing that Claimant has not established the existence of total disability due to pneumoconiosis. Since Claimant's filed his second duplicate claim on June 18, 1999, Employer must adduce sufficient evidence to show that a medical determination of total disability due to pneumoconiosis was communicated to Claimant prior to June 18, 1996 to rebut the presumption of timeliness. The denial of Claimant's two prior claims, on the basis that Claimant could not establish the existence of total disability due to pneumoconiosis, became final and effective on January 31, 1995 and March 12, 1998. Accordingly, since Claimant was determined not to have pneumoconiosis by the Director, OWCP as recently as March 12, 1998, any medical opinion issued prior to March 12, 1998 is rendered invalid and Claimant was handed a "clean slate" for statute of limitations purposes. *Dukes*, 48 Fed.Appx. at 146. Under the reasoning of *Dukes*, any medical opinion communicated to Claimant informing him that he was totally disabled due to pneumoconiosis, prior to March 12, 1998, was a misdiagnosis. A misdiagnosis of pneumoconiosis does not trigger the three-year statute of limitations. Since Claimant filed his second duplicate claim on June 18, 1999, even if a medical determination of total disability due to pneumoconiosis was communicated to Claimant right after the Director, OWCP's denial on March 12, 1998, Claimant's second duplicate claim would be timely filed. Therefore, I find that Claimant's June 18, 1999 claim for benefits was filed before three years after a medical determination of total disability due to pneumoconiosis was communicated to him. Claimant's second duplicate claim is not barred by the three-year statute of limitations of § 718.308(a).

Medical Evidence

I incorporate by reference, as if fully rewritten herein, to the extent it is consistent with any medical evidence contained herein, all chest x-rays, pulmonary function tests, arterial blood gas studies, electrocardiograms, hospital records, treatment records, and medical reports contained in the prior decision and order awarding benefits dated May 31, 2001.

DISCUSSION AND APPLICABLE LAW

Mr. Furgerson's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, the following elements:

1. That he suffers from pneumoconiosis;

2. That the pneumoconiosis arose, at least in part, out of coal mine employment;

3. That the claimant is totally disabled; and

4. That the total disability is caused by pneumoconiosis.

See §§ 719.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore*, 9 B.L.R. 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-212 (1985). Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987).

Duplicate Claim

Claimant filed the present claim on June 18, 1999. His previous claim was denied on March 12, 1998. The provisions of § 725.309 apply to new claims that are filed more than one year after a prior denial. Section 725.309 is intended to provide claimants relief from the ordinary principles of *res judicata*, based on the premise that pneumoconiosis is a progressive and irreversible disease. *See Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990); *Orange v. Island Creek Coal Compamy*, 786 F.2d 724, 727 (6th Cir. 1986); § 718.201(c) (Dec. 20, 2000). Section 725.309(d) provides that:

> If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met.

The Benefits Review Board defined "material change in conditions" under § 725.309(d) as occurring when a claimant establishes, by a preponderance of the evidence developed subsequent to the prior denial, at least one of the elements of entitlement previously adjudicated against the claimant. *See Allen v. Mead Corp.*, 22 B.L.R. 1-61 (2000). A material change in conditions may only be based upon an element which was previously denied. *Caudill v. Arch of Kentucky, Inc.*, 22 B.L.R. 1-97 (2000) (en banc on recon.) (where Administrative Law Judge found that claimant did not establish pneumoconiosis and did not specifically address total disability, the issue of total disability may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions). Lay testimony alone is insufficient to establish a material change in conditions. *Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122 (1999).

This matter arises under the jurisdiction of the Sixth Circuit Court of Appeals.[6] In *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), the Sixth Circuit held that, under *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), it is insufficient for the ALJ to merely analyze the newly submitted evidence to determine whether an element previously adjudicated against the claimant has been established. An administrative law judge must also compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence is substantially more supportive of claimant. *Kirk*, 264 F.3d at 609. However, when comparing the newly submitted evidence against the previously submitted evidence, only a substantial difference in the bodies of evidence is required, not a complete absence of evidence at the earlier time. *Id.* at 610 It is legal error for an administrative law judge not to show that there was a worsening of Claimant's condition on the element selected to show a material change. *Id.* at 609.

Claimant's initial claim was denied by the Director, OWCP on January 31, 1995 because Claimant did not establish the existence of pneumoconiosis, that he suffered from pneumoconiosis arising out of coal mine employment, and because he did not show that he was totally disabled

[6]Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc). Miner last engaged in coal mine employment in Kentucky.

due to pneumoconiosis. Claimant's first duplicate claim was denied because Claimant failed to establish a material change in conditions since the initial denial. Accordingly, in order for Claimant to establish a material change in conditions and prevent his second duplicate claim from being dismissed on the basis of the prior denials, he must adduce medical evidence substantially different from the previous evidence that shows a worsening physical condition and establishes an element previously adjudicated against him.

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

> For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
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> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
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> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

Section 718.201(a).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. The newly submitted evidentiary record consists of five interpretations of two x-rays. Drs. Baker and Alexander, who are both B-readers, found the July 20, 1999 film to be positive for the existence of pneumoconiosis. To the contrary, Dr. Barret found the film to be negative and Dr. Sargent interpreted the film as 0/1, which is not a positive finding. Drs. Sargent and Barret are dually-certified as radiologists and B-readers. It is proper to credit the interpretation of a dually-certified physician over the interpretation of a B-reader. *Cranor v. Peabody Coal Co.*, 22

B.L.R. 1-1 (1999) (en banc on recon.). I attribute greater weight to the interpretations of Drs. Barrett and Sargent based on their credentials as dually-certified physicians. Accordingly, I find that the July 20, 1999 x-ray is negative. The only other newly submitted x-ray interpretation was rendered by Dr. Ramakrishnan on March 16, 2000. Dr. Ramakrishnan, who is a B-reader, found the film to be negative. Absent any evidence to the contrary, I find that the March 16, 2000 film is negative.

I have determined that both of the newly submitted x-rays are negative for the existence of pneumoconiosis. Therefore, I find that the Claimant has not established the existence of pneumoconiosis through the newly submitted x-ray evidence under subsection (a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. There is no biopsy evidence to consider. Therefore, I find that the Claimant has failed to establish the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

The newly submitted evidentiary record contains the medical reports of Drs. Baker, Ahmad, Smiddy, and Younes. Dr. Baker examined Claimant on July 20, 1999 and completed a

Department of Labor Medical History and Examination for Coal Mine Workers' Pneumoconiosis form. He considered an accurate account of Claimant's coal mine employment and smoking histories. Upon physical examination, Dr. Baker detected decreased breath sounds. He performed a chest x-ray and interpreted it as positive for pneumoconiosis. From the results of a pulmonary function test ("PFT") he diagnosed a moderate obstructive defect. Dr. Baker found the results of a an arterial blood gas study ("ABG") to reveal mild resting arterial hypoxemia. Dr. Baker diagnosed chronic obstructive pulmonary disease ("COPD") from the PFT, chronic bronchitis from Claimant's history of cough, sputum production and wheezing. He also diagnosed hypoxemia from the ABG. He attributed all of Claimant's cardiopulmonary diagnoses as primarily caused by coal dust exposure and cigarette smoking. Dr. Baker then checked "YES" under the question asking whether Claimant has an occupational lung disease that was caused by Claimant's coal mine employment. He based his diagnosis on an abnormal chest x-ray and significant duration of exposure.

The Sixth Circuit Court of Appeals has held that merely restating an x-ray is not a reasoned medical judgment under § 718.202(a)(4). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). The Board has also explained that, when a doctor relies solely on a chest x-ray and coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his opinion "merely a reading of an x-ray . . . and not a reasoned medical opinion." *Taylor v. Brown Bodgett, Inc.*, 8 B.L.R. 1-405 (1985). *See also Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(citing *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989)(it is permissible to discredit the opinion of a physician which amounts to no more than a restatement of the x-ray reading). Even though he interpreted Claimant's x-ray as positive for coal workers' pneumoconiosis ("CWP"), he did not include CWP under his diagnosis section. He also diagnosed chronic bronchitis and COPD primarily caused by coal dust exposure, both of which satisfy the legal definition of pneumoconiosis. Dr. Burki opined that the PFT was acceptable. He documented Claimant's history of subjective respiratory related complaints. Dr. Baker has certainly set forth clinical observations and findings, and his diagnosis of COPD and chronic bronchitis are adequately supported by the evidence. His opinion is reasoned and documented. I find that Dr. Baker's opinion is entitled to probative weight enhanced by his credentials as a board-certified pulmonologist.

Dr. Ahmad authored a narrative letter dated February 16, 2000. He opined that Claimant suffered from a moderate obstructive defect as well as a restrictive defect based on pulmonary function testing performed in April 1999. Dr. Ahmad's report of the April 1999 PFT does not substantially comply with § 718.103(b) because it was not submitted with tracings, nor was there a statement signed by the physician or technician who performed the test. Dr. Ahmad's diagnosis of a moderate obstruction and a suggested restrictive defect is based solely on the April 1999 PFT. Therefore, I find that Dr. Ahmad's report of February 16, 2000 is insufficient to establish the fact for which it was proffered. *See* § 718.101(b). Moreover, Dr. Ahmad did not render an opinion as to the etiology of Claimant's pulmonary impairment. As such, his diagnosis of a respiratory impairment does not satisfy the definition of legal pneumoconiosis. Dr. Ahmad's opinion cannot establish the existence of pneumoconiosis.

Upon referral from Dr. Ahmad, Dr. Smiddy examined Claimant and issued a narrative report on March 16, 2000. Dr. Smiddy is board-certified in internal medicine and the subspecialty of pulmonary disease. He considered a 23 year history of coal mine employment and a history of cigarette smoking that ended in 1996. Upon reviewing some of Claimant's old chest x-rays, he recommended a follow-up x-ray, as well as a PFT and an ABG. After reviewing the x-ray interpretation of Dr. Ramakrishnan, Dr. Smiddy dictated a letter to Claimant, confirming that Claimant does have CWP based on the x-ray interpretation of Dr. Smiddy. Dr. Smiddy's diagnosis of CWP is based solely on Dr. Ramakrishnan's x-ray interpretation. Dr. Smiddy's letter does not constitute a reasoned medical opinion. Accordingly, it does not establish the existence of pneumoconiosis under subsection (a)(4).

On July 6, 2000, a claims examiner from the OWCP forwarded some of Claimant's medical records to Dr. Younes, requesting his narrative assessment to confirm if Claimant was disabled due to pneumoconiosis arising out of coal mine employment. On June 19, 2000, Dr. Younes completed the form sent to him by the OWCP. He marked the "YES" box under the question of whether miner has an occupational lung disease which was caused by his coal mine employment. Dr. Younes wrote that the basis for his opinion was chest x-ray findings and a moderate obstructive impairment which was caused partially by occupational dust exposure. He categorized the extent of Claimant's pulmonary impairment as a moderate impairment. Dr. Younes concluded that Claimant's impairment was primarily caused by his history of tobacco smoking, but also found that occupational dust exposure is a contributing factor. Dr. Younes questionnaire answers do not constitute a reasoned medical opinion. He failed to set forth any clinical observations or findings. He did not identify any evidence to support his opinion. Dr. Younes opinion does not establish the existence of pneumoconiosis under subsection (a)(4).

Of the four newly submitted narrative opinions, only Dr. Baker's opinion constituted a reasoned medical opinion. He rendered diagnoses consistent with legal pneumoconiosis. Employer submitted no evidence to the contrary. On the basis of Dr. Baker's reasoned medical opinion finding the existence of legal pneumoconiosis, I find that Claimant has established the existence of pneumoconiosis under subsection (a)(4). Thus, Claimant has established an element of entitlement previously adjudicated against him. I must now compare the sum of the newly submitted evidence against the previously submitted evidence to determine if Claimant's condition has physically worsened and to find out if the newly submitted evidence is substantially more supportive.

In summary, the newly submitted evidence consists of two chest x-rays determined to be negative and four narrative medical reports, only one of which is a reasoned medical opinion finding pneumoconiosis. The previously submitted evidence consists of fifteen interpretations of eight chest x-rays, as well as four narrative medical reports. The previously submitted x-ray evidence dates back to 1983. Dr. Wells, a dually-certified physician, rendered positive interpretations twice in 1983 and once in 1984. I find that all three of these x-rays were positive since there were no contrary interpretations. Dr. Wright issued the sole interpretation of a 1984 x-ray, finding it to be negative. Drs. Barrett and Sargent, who are both dually-certified as radiologists and B-readers interpreted the same 1994 x-ray as negative. Dr. Tiu, a board-certified radiologist interpreted the same x-ray as positive. I accord greater weight to the opinions of Drs. Barrett and Sargent on the basis of their credentials as dually-certified physicians, and I find the

1994 x-ray to be negative. Five physicians interpreted a 1996 x-ray as negative. There were no contrary interpretations. Thus, I find the December 2, 1996 x-ray to be negative. Similarly, two physicians offered uncontradicted negative interpretations of a March 5, 1996 x-ray. I find the March 5, 1996 x-ray to be negative. Aside from three positive x-rays from 1983 and 1984, as interpreted by the same physician, the other five x-rays were negative.

Dr. Wright's 1984 medical report finds that the diagnosis of an occupational pneumoconiosis or any other occupational lung injury cannot be made. However, he did diagnose mild chronic bronchitis associated with smoking and the inhalation of respirable dust. Dr. Kabani's 1994 notes his physical finding of decreased air entry into Claimant's lungs, as well as a history of cough, sputum, wheezing, dyspnea, hemoptysis, and paroxysmal nocturnal dyspnea. Dr. Kabani noted a positive chest x-ray interpretation. From a PFT he diagnosed a mild to moderate obstructive defect, in addition to mild hypoxemia from an ABG. He opined that Claimant suffered from COPD based on the spirometry and Claimant's smoking history. Dr. Kabani also diagnosed occupational pneumoconiosis, noting that an obstructive lung disease and interstitial lung disease was present in Claimant who has a history of smoking and exposure to coal dust with symptoms of dyspnea, cough, wheezing, and sputum production. He concluded that Claimant's COPD and CWP are due to smoking heavily as well as exposure to coal dust while working in the mines.

Dr. Dahhan examined Claimant on December 2, 1994 and then again on march 5, 1996. Following his 1994 examination, Dr. Dahhan found that Claimant suffered from a mild obstructive lung disease and mild hypoxemia, with no evidence of occupational pneumoconiosis or pulmonary disability secondary to coal dust exposure. He attributed Claimant's mild obstructive airways disease to Claimant's 26 pack years of smoking habit that is sufficient to cause a respiratory impairment in a susceptible individual. After the 1996, examination, Dr. Dahhan diagnosed moderate COPD due to smoking. He offered no rationale to support his conclusion.

A comparison of the newly submitted evidence with the previously submitted evidence does not establish that Claimant's conditions worsened. The prior x-ray evidence was negative, just as the newly submitted x-ray evidence was negative. From 1994 to February 1996, Drs. Kabani and Dahhan found that Claimant suffered from a moderate degree of COPD, chronic bronchitis, and resting hypoxemia. In 1999, Dr. Baker found a moderate level of COPD and chronic bronchitis. Thus, from 1994 to 1999, Claimant's moderate COPD and chronic bronchitis arising out of smoking and coal dust exposure remained the same; there was no physical change. Claimant reported essentially the same subjective symptoms from 1984 through 1996 as he did in 1999 and 2000. I find that the newly submitted evidence is not substantially different than the previous evidence. I also find that Claimant has not established a worsening of his condition. Therefore, I find that Claimant has not established a material change in conditions under § 725.309(d) through evidence of pneumoconiosis.

Total Disability

Claimant may still establish a material change in conditions by demonstrating that he is totally disabled under § 718.204(b).[7] Claimant must demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under Section 718.204(b), all relevant probative evidence, both "like" and "unlike" must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

Claimant has not presented any evidence that he suffers from complicated pneumoconiosis. I find that Claimant has not established the existence complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. The record consists of three newly submitted PFTs. The July 20, 1999 PFT performed by Dr. Baker produced qualifying values, as the FEV1 and the MVV were lower than the regulatory values for a person whose age was 54 and height was 67.7 inches. The technician who conducted the study termed Claimant's effort as fair and his understanding as good. Dr. Dahhan opined that this study was invalid because Claimant only exerted fair effort, not optimal effort. Dr. Burki evaluated the tracings and found the study to be acceptable. Since Dr. Burki had the opportunity to evaluate the actual tracings, while Dr. Dahhan only reviewed the technician's summary report, I accord greater weight to the opinion of Dr. Burki. Therefore, I find that the July 20, 1999 PFT is a valid test that supports a finding of total disability. Dr. Smiddy performed a PFT on March 13, 2000, which produced a qualifying result, as the FEV1 and MVV values were lower than the regulatory values for a person whose age was 55 and height was 67.7 inches. Dr. Younes opined that this test was valid. Therefore, I find that the March 13, 2000 test supports a finding of total disability. Dr. Smiddy performed another PFT on March 30, 2000, which produced a qualifying result, as the FEV1 and the MVV value were lower than the regulatory values for a person whose age was 55 and height was 67.7 inches. Dr. Younes opined that this test was invalid due to an insufficient number of FEV1, FVC, or MVV tracings without explanation for deficiency. In reliance on Dr. Younes opinion, I find that the March 30, 2000 PFT is invalid. The March 30, 2000 PFT cannot support a finding of total disability. After excluding the invalid March 30, 2000

[7]The prior denial of benefits found that Claimant had not established that he was totally disabled due to pneumoconiosis. The Sixth Circuit has cautioned against treating total disability due to pneumoconiosis as one element of entitlement. *See Kirk*, 264 F.3d at 610, footnote 7 (finding that an administrative law judge committed error by failing to recognize the crucial distinction between total disability and total disability due to pneumoconiosis for purposes of analyzing what element was previously adjudicated against the claimant). The Director, OWCP based the denial of benefits on Claimant's failure to establish total disability due to pneumoconiosis. Absent a specific finding of total disability, it is implied from the Director, OWCP's holding that Claimant neither established total disability nor total disability due to pneumoconiosis.

PFT, the newly submitted record consists of two PFTs that both produced values that qualify for total disability. Therefore, I find that the newly submitted pulmonary function test evidence establishes the existence of total disability under § 718.204(b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) by the results of arterial blood gas studies. The record contains two newly submitted ABGs, dated July 20, 1999 and March 30, 2000. Neither study produced qualifying values. Therefore, I find that Claimant has not established total disability under § 718.204(b)(2(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The newly submitted evidentiary record does not contain any evidence of cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has not established total disability under § 718.204(b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that Miner's respiratory or pulmonary condition prevented Miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment consisted of operating a continuous mining machine at the face of the mine, which required him to lift approximately 50 to 100 pounds on a daily basis and to sit for seven hours a day.

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Dr. Baker conducted a physical examination on July 20, 1999. He interpreted the results of a PFT as revealing a moderate obstructive defect. He also conducted an ABG that showed mild resting hypoxemia. Dr. Baker opined that Claimant suffers from a moderate pulmonary impairment. He opined that Claimant does not retain the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment due to his FEV1 value that was 52% of the predicted value. Dr. Baker considered an accurate description of Claimant's coal mine employment. He set forth clinical observations and findings, and relied upon adequate data to support his opinion. I find that Dr. Baker's opinion is entitled to probative weight enhanced by his credentials as a board-certified pulmonologist.

Dr. Ahmad's letter refers to a PFT from April 1999, which is not contained in the record, and opines that Claimant has a moderate obstruction and a suggested restrictive defect. He stated that Claimant's respiratory symptoms are quite frequent and could well have caused him to have decreased activity. Dr. Ahmad's report of the April 1999 PFT does not substantially comply with § 718.103(b) because it was not submitted with tracings, nor was there a statement signed by the physician or technician who performed the test. Dr. Ahmad's diagnosis of a moderate obstruction and a suggested restrictive defect is based solely on the April 1999 PFT. Therefore, I find that Dr. Ahmad's report of February 16, 2000 is insufficient to establish the fact for which it was proffered. *See* § 718.101(b).

Dr. Smiddy examined Claimant on March 16, 2000. He opined that Claimant suffered from a severe impairment based on the PFT conducted on March 13, 2000. He issued a brief narrative report on March 30, 2000, wherein he determined that a PFT and an ABG performed on March 30, 2000 both revealed a severe impairment. In summary, Dr. Smiddy conducted a physical examination of Claimant and reviewed two PFTs and an one ABG. Dr. Younes opined that the March 30, 2000 PFT was invalid due to a lack of tracings, and the ABG from which Dr. Smiddy diagnosed a severe impairment did not qualify for total disability under the regulatory tables. He set forth clinical observations and findings, but his opinion of a severe impairment is not supported by the evidence upon which he relies. I find that Dr. Smiddy's opinions on the level of Claimant's impairment is entitled to a lesser degree of probative weight enhanced by his credentials as a board-certified pulmonologist.

Dr. Younes reviewed some of Claimant's medical records and concluded that Claimant does not retain the respiratory capacity to perform his usual coal mine employment or comparable work in a dust-free environment due to his moderate obstructive ventilatory defect. Dr. Younes report is conclusory. He does not set forth any clinical observations or findings. Therefore, I find that Dr. Younes' opinion is entitled to a lesser degree of probative weight.

Claimant's usual coal mine employment as a continuous mining machine operator is not the most physically demanding mining position. He sat for seven hours a day. On a daily basis, he was required to lift 50 to 100 pounds. At the time of the hearing, he was 56 years-old. The weight of the evidence, despite Dr. Smiddy's finding of a severe impairment, establishes the Claimant suffers from a moderate obstructive ventilatory defect and mild resting arterial hypoxemia. Dr. Baker was aware of the exertional requirements of Claimant's usual coal mine employment when he determined that Claimant's moderate impairment prevented him from retaining a sufficient respiratory capacity to perform his usual coal mine employment. Although Claimant sat for 7 hours a day, he experiences mild hypoxemia at rest. On the basis of Dr. Baker's report, I find that Claimant is entitled to a *prima facie* finding of total disability since he is unable to perform his usual coal mine employment. Employer has adduced no evidence to establish that Claimant is able to perform comparable gainful work in a dust-free environment. Therefore, I find that Claimant is totally disabled under subsection (b)(2)(iv).

Claimant has presented evidence sufficient to establish total disability under subsections (b)(2)(i) and (iv) through pulmonary function tests and narrative reports. He failed to establish total disability through arterial blood gas evidence under subsection (b)(2)(ii), as well as through evidence that he suffers from cor pulmonale with right-sided congestive heart failure under

subsection (b)(2)(iii). In sum, the newly submitted evidence consists of one invalid PFT, two qualifying PFTs, two non-qualifying ABGs, and the three physician narrative reports that collectively establish Claimant's inability to perform his usual coal mine employment. The only evidence that does not tend to show total disability are the two non-qualifying ABGs, which were interpreted as revealing mild resting arterial hypoxemia. The combined weight of the PFTs and narrative reports is more persuasive than two non-qualifying ABGs. Therefore, after considering all evidence like and unlike, I find that Claimant has established that he is totally disabled due to a moderate pulmonary obstructive impairment and mild resting arterial hypoxemia. The element of total disability was previously adjudicated against Claimant. In order for Claimant to establish a material change in conditions under § 725.309(d), he must show that his pulmonary condition physically worsened through newly submitted evidence that is substantially more supportive of total disability than the prior evidence.

The prior record contained the following evidence concerning total disability. After examining Claimant and conducting objective testing, on July 14, 1984 Dr. Wright opined that Claimant could continue to perform arduous labor. He found that Claimant suffered from mild resting hypoxemia and mild chronic bronchitis. Claimant complained of dyspnea on exertion, occasional wheezing, and nocturnal dyspnea. On September 15, 1994, Dr. Kabani concluded that Claimant has a moderate degree of respiratory impairment that precludes him from working in the coal mines. Dr. Kabani's diagnosis arose out of his physical examination and a PFT and ABG that he conducted. Claimant complained to Dr. Kabani of cough, sputum, wheezing, dyspnea, hemoptysis, and paroxysmal nocturnal dyspnea. On December 2, 1994, Dr. Dahhan examined Claimant and performed a PFT and an ABG. He found the invalid PFT to reveal a mild obstructive defect and the ABG to reveal mild hypoxemia. Dr. Dahhan concluded that Claimant retained the physiological capacity to perform, from a respiratory standpoint, his previous coal mining work or a job of comparable physical demand. Dr. Dahhan examined Claimant again on March 5, 1996. This time Dr. Dahhan diagnosed COPD. He found that Claimant suffered from a moderate respiratory impairment, and that Claimant does not retain the respiratory capacity to return to his previous coal mining work or a job of comparable physical demand. On both occasions, Claimant complained to Dr. Dahhan of sputum production, wheezing, dyspnea on exertion, and cough.

The prior record tracks Claimant's respiratory impairment from only mild resting hypoxemia in 1984, to a mild obstructive defect and mild hypoxemia in 1994, and ultimately to a moderate obstructive defect and mild hypoxemia by 1996. In 1996, Dr. Dahhan found that Claimant's moderate pulmonary impairment prevented him from performing his previous coal mine employment. The newly submitted evidence establishes that Claimant suffers from a moderate pulmonary impairment and mild resting hypoxemia that prevents him from performing his usual coal mine employment. Claimant's PFT values have declined from the first PFT of record in 1984 through the last PFT performed on March 30, 2000. However, Claimant has aged 16 years over that time period. Claimant's ABG values have remained essentially the same over the 16 year time period. Claimant began complaining of dyspnea on exertion, a productive cough, and wheezing in 1984, and he was still reporting the same symptoms at the time of the hearing. I find that he newly submitted evidence does not establish a worsening of Claimant's condition. By 1996, Claimant was unable to perform his usual coal mine employment due to a moderate obstructive impairment, which is exactly what the newly submitted evidence establishes. There is

no qualitative or substantive difference between the newly submitted evidence and the previously submitted evidence regarding total disability. Therefore, I find that Claimant has not established a material change in conditions. Since Claimant has failed to establish a material change in conditions since his prior denial, he second duplicate claim must also be denied on the basis of the prior denials according to § 725.309(d).

Entitlement

The Claimant, Billy Furgerson, has failed to establish a material change in conditions since his prior denial of benefits. Therefore, Mr. Furgerson is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of Billy Furgerson for benefits under the Act is hereby DENIED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.**